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No. 94-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF TEXAS, N.A.,
Petitioner,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Cases Page

Bell & Murphy & Assocs. v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990) 4

D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942) 2, 3, 4, 5

FDIC v. *Bledsoe*, 989 F.2d 805 (5th Cir. 1993) 8

Hoffeld v. *United States*, 186 U.S. 273 (1902) 5

Jackson v. *Thweatt*, 883 S.W.2d 171 (Tex.), *cert. denied*, 115 S. Ct. 196 (1994) 5, 8

Kilpatrick v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991) 4, 6

NCNB Texas Nat'l Bank v. *Cowden*, 895 F.2d 1488 (5th Cir. 1990) 6

O'Melveny & Myers v. *FDIC*, 114 S. Ct. 2048 (1994) 5, 6

Porras v. *Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990) 4

SBA v. *McClellan*, 364 U.S. 446 (1960) 7

Successor Trust Committee v. *First State Bank*, 735 F. Supp. 708 (W.D. Tex. 1990) 6

United States Department of the Treasury v. *Fabe*, 113 S. Ct. 2202 (1993) 7

Statutory Provisions

12 U.S.C. § 1823(e) (1988) 2, 4, 5

31 U.S.C. § 3713 ..... 2, 3, 5, 7

Cal. Ins. Code § 1033(a)(4) 7

Other

Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers From the FDIC*, 110 Banking L.J. 292 (1993) 5

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REPLY BRIEF FOR PETITIONER

The court below held that an express assignment by the FDIC of "all right, title and interest" of the FDIC in the assets of a failed institution did not constitute "an assignment of *anything* belonging to the FDIC," Pet. App. 13a (emphasis in original), but instead only an assignment of such rights and interests as the failed bank enjoyed before it was taken over by the FDIC. As we demonstrated in the petition (at 9-16), this holding conflicts with decisions from the Courts of Appeals for the Fifth, Eighth, and Eleventh Circuits, and from the Supreme Courts of Colorado, Kansas, Nebraska, and Texas. Those courts hold that such an assignment transfers to the assignee bank special rights belonging to the FDIC that plainly were *not* enjoyed by the failed bank—including the FDIC's right to a longer statute of limita-

tions, the FDIC's right under *D'Oench, Duhme* to defeat unrecorded agreements, and the FDIC's similar statutory right under 12 U.S.C. § 1823(e) (1988). Nothing in the responses to the petition mitigates this conflict, or diminishes the importance of the question presented.[1]

1. Respondents' primary effort to defeat certiorari consists of arguing at length over questions that they acknowledge are *not* presented by the petition. Thus, the Commercial National Bank respondents devote the major portion of their opposition ("CNB Opp.") to an argument that the FDIC is not entitled to priority under 31 U.S.C. § 3713. CNB Opp. at 10-17. They advance this argument in the face of their acknowledgment that this question is not at issue in the present petition, *id.* at 6, and despite the fact that the court below assumed for purposes of decision that the FDIC is entitled to the priority. Pet. App. 12a. Respondent Insurance Commissioner also argues at length in his opposition ("Comm'r Opp.") that the FDIC is not entitled to priority, and that government priority rights may not be assigned. Comm'r Opp. at 3 n.1, 21-25. The Commissioner implicitly acknowledges that these questions are in fact not before this Court, by asserting that if certiorari is granted, *he* will raise these additional questions, *see id.* at i, even though the court below expressly did not decide them.[2]

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[1] Petitioner's Rule 29.1 statement appears at Pet. ii.

[2] Nearly the Insurance Commissioner's entire opposition depends upon his answer to a question not presented in the petition. Thus, the Commissioner notes that FIRREA conferred certain powers on the FDIC, and he acknowledges that the cases on which we rely "have found that the same policy rationale motivating Congress to supply the FDIC with such powers sufficiently supports the FDIC's assignment of such powers." Comm'r Opp. at 9-10. He attempts to distinguish the present case, however, by asserting that "Congress has never enacted any statute affording the FDIC the right to governmental priority." *Id.* at 10. But the Court of Appeal expressly assumed that Congress did just that in 31 U.S.C. § 3713.

The short answer to respondents' extended argument over questions that are not presented is that those questions are not presented. The court below assumed that the FDIC enjoys priority under 31 U.S.C. § 3713 and that it could assign that priority, Pet. App. 12a & n.8, but held that the standard assignment language employed by the FDIC did not transfer *any* rights of the FDIC to assignee banks. *Id.* at 13a. That holding has significance far beyond the questions whether the FDIC is entitled to or may assign priority, and it is that holding that conflicts with the decisions of three federal courts of appeals and four state supreme courts. Certiorari should be granted to resolve the conflict over whether the FDIC's standard assignment language does indeed assign *its* rights to assignee banks; the question of what priority rights the FDIC does or does not enjoy should be resolved on remand in the event this Court reverses the decision below. *See* Pet. at 6 n.2.

2. In contrast to the energy they spend on questions that are not presented, the Commercial National Bank respondents devote only a few pages to defending the decision of the court below on its own terms. CNB Opp. at 6-8. They contend that the court below held only that the FDIC did not assign its priority to petitioner, and not that the FDIC *could* not do so. *Id.* at 7. What the Court of Appeal held, however, was that the FDIC did not assign its priority to petitioner because the assignment was not made expressly. Pet. App. 14a. The same is true with respect to each and every case holding that the FDIC *does* assign its greater federal powers to bridge banks through its standard purchase and assumption agreement. In none of those cases was there an express assignment of the FDIC's *D'Oench, Duhme* rights or its longer statute of limitations, yet in each instance the courts concluded that the assignment of the FDIC's right, title and interest in the underlying assets conveyed the FDIC's special federal rights with respect to those assets.

Respondents are therefore mistaken in suggesting that the decision below does not conflict with the cases cited

in the petition. If the other courts had used the reasoning of the court below that a purchase and assumption agreement transfers to the bridge bank only the rights of the failed bank, and not the rights of the FDIC, *all* of the cases cited in the petition would have been decided differently.

Respondent Insurance Commissioner contends there is no conflict because the cases on which we rely involve "implied assignment of statutory rights that Congress specifically granted under FIRREA" and "merely hold that certain protections expressly granted the FDIC may be enforced." Comm'r Opp. at 5, 11 n.9. Not so. Several of the cases involve assignment of the FDIC's special rights under the common law doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), rather than express statutory rights granted under Section 1823(e) of FIRREA.[3] The source of the particular FDIC right at issue is, in any event, beside the point. The court below held that the standard assignment by the FDIC of its interests did not effect "an assignment of *anything* belonging to the FDIC." Pet. App. 13a (emphasis in original). The suggestion that this ruling can be reconciled with precedents holding that the standard assignment does indeed transfer special rights belonging to the FDIC, depending on the particular source of the right, is wholly unavailing.

The Insurance Commissioner further argues that the decision below is correct because FIRREA "suggests no basis for an implication of assignment of rights belonging to the FDIC." Comm'r Opp. at 21 n.15, *see id.* at 7 n.5. The same argument could be made, however, with respect to the FDIC's rights under *D'Oench, Duhme*, or the FDIC's right to a longer limitations period. FIRREA

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[3] *See, e.g., Bell & Murphy & Assocs.* v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1526 n.4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *Porras* v. *Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990).

says nothing about the assignment of those rights either, yet the courts have uniformly held that those rights are transferred to assignee banks pursuant to the identical assignment language at issue in this case.[4] Once again, the Commissioner's arguments do nothing to mitigate the conflict documented in the petition.

In fact, rather than offer any arguable distinctions, the Commissioner instead suggests that the cases surveyed in the petition may no longer be good law after this Court's decision in *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). Comm'r Opp. at 21. The Commissioner's effort to discredit the uniform body of recent precedent from three federal circuits and four state supreme courts is misplaced. In *O'Melveny & Myers*, the FDIC sought creation of a federal common law right, unique to it, that would allow it to preempt established state law principles and prevail on a state law tort claim. In contrast, the issue in the instant case is not the creation of a federal common law right in the FDIC, but the assignment by the FDIC of a federal *statutory* right to priority in certain insolvency proceedings. *See* 31 U.S.C. § 3713. Here there is no question of a right unique to the FDIC in derogation of state law, but instead simply the application of the established rule—consistent with state law—that a "voluntary assignee is ordinarily invested with all the rights his assignor possessed." *Hoffeld* v. *United States*, 186 U.S. 273, 276 (1902). *O'Melveny & Myers* had nothing whatever to do with the question of whether federal statutory rights enjoyed by the FDIC are assigned along with the assets to which those rights attach. But

[4] As the Texas Supreme Court recently noted in rejecting a similar argument, "one could just as easily argue that 'Congress knew of the extensive body of case law extending the FDIC's benefits (like federal holder in due course, *D'Oench, Duhme* and Section 1823(e)), and therefore thought it unnecessary to restate the federal common law.'" *Jackson* v. *Thweatt*, 883 S.W.2d 171, 175 (Tex.) (quoting Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers From the FDIC*, 110 Banking L.J. 292, 304 (1993)), *cert. denied*, 115 S. Ct. 196 (1994).

if indeed the Commissioner is right that *O'Melveny & Myers* calls into question the established body of precedent relied upon in the petition, that in itself is a compelling reason to grant certiorari.

3. Both the Commercial National Bank respondents and the Insurance Commissioner seek to limit the significance of the decision below by arguing that the Court of Appeal was simply construing the language of a particular agreement. CNB Opp. at 5; Comm'r Opp. at 5-6. The language at issue in this case, however, is the standard assignment language used by the FDIC in its bridge bank and other purchase and assumption transactions. *See, e.g., NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488 (5th Cir. 1990) (identical language); *Kilpatrick* v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990) (same), *cert. denied*, 498 U.S. 1083 (1991); *Successor Trust Committee* v. *First State Bank*, 735 F. Supp. 708, 711 (W.D. Tex. 1990) (same); Pet. App. 12a ("identical language" in Capital Bank & Trust Co. purchase and assumption agreement). There were more than 500 such transactions from 1989-1993 alone. *See* Pet. at 28 & n.9. Viewing the decision below as a construction of the purchase and assumption agreement confirms rather than undermines the broader significance of the ruling below that the language of that standard agreement does not effect "an assignment of *anything* belonging to the FDIC." Pet. App. 13a (emphasis in original).

We reiterated in the petition that the language of the purchase and assumption agreement at issue in this case was indistinguishable from the language in the agreements at issue in the conflicting cases. *See* Pet. at 10, 13, 16, 22. One would have expected respondents' contention—that the decision below turned on a construction of the language of the agreement—to be accompanied by an explanation of how that language differed from that of the agreements in the other cases. But no such explanation appears in the oppositions. The reason is that there are no pertinent differences.

In any event, as the other courts that have considered the question have concluded, the question whether the FDIC transfers *its* rights to assignee banks turns not simply on the language of the purchase and assumption agreement, but also on federal banking statutes, the policies underlying those statutes, and federal common law. Courts construing language in purchase and assumption agreements indistinguishable from the language at issue here have looked to these other considerations in deciding—contrary to the holding below—that the FDIC transfers special rights it enjoys, and not merely the rights of the failed institution, to its assignees. *See* Pet. at 18-21, 25-28.

4. Respondents argue that it would be inequitable to accord petitioner's claims priority in the Executive Life liquidation proceeding, *see* CNB Opp. at 9; Comm'r Opp. at 3, but again that argument does not go to the question presented. The Court of Appeal assumed that the federal government priority in 31 U.S.C. § 3713 could be asserted by the FDIC, Pet. App. 12a, and California law itself accords priority to "[c]laims having preference by the laws of the United States." Cal. Ins. Code § 1033 (a)(4). The question is not whether granting such priority is a good idea, but whether the FDIC assigns that priority when it assigns "all right, title and interest" that it enjoys to a transferee bank. To the extent such an assignment results in priority for claims inherited by the assignee bank, this is "a result, not of any inequality of distribution on the part of the * * * court, but of the bank's valid contract with the [agency]." *SBA* v. *McClellan*, 364 U.S. 446, 452-453 (1960).[5]

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[5] Contrary to the Insurance Commissioner's suggestion, Comm'r Opp. at 18-19, nothing in *United States Department of the Treasury* v. *Fabe*, 113 S. Ct. 2202 (1993), supports the decision below. *Fabe* held that 31 U.S.C. § 3713 did not preempt a state statute governing priorities in insurance insolvencies, but petitioner is not arguing for any such preemption of state law. Here, as noted, state law itself assigns priority to "[c]laims having preference by the laws of the United States." Cal. Ins. Code § 1033(a)(4).

5. The state Insurance Commissioner—alone among the parties to the case, including the other respondents before this Court—argues that the question whether petitioner succeeded to the FDIC's special federal rights is governed by state rather than federal law. The Commissioner cites no case so holding, however, and in fact the cases uniformly recognize that the issue is one of federal law. *See, e.g., FDIC* v. *Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993); *Jackson* v. *Thweatt*, 883 S.W.2d at 175. That is certainly the position of the FDIC, which includes in its purchase and assumption agreements a provision specifying that "[t]his Agreement and the rights and obligations hereunder shall be governed by and construed in accordance with the federal law of the United States of America * * *." Pet. App. 27a.

Undeterred, the Commissioner notes that this provision goes on to provide that "in the absence of controlling federal law" the agreement will be construed "in accordance with the laws of the State of Texas," and argues that because there is no controlling federal law, state law governs. *See* Comm'r Opp. at 2. This plainly begs the very question presented to this Court. Other courts have held that there *is* controlling federal law—that the special federal rights of the FDIC *are* transferred to assignee banks when the FDIC assigns the underlying interests and assets. The Commissioner cannot avoid review of the conflicting ruling of the court below simply by assuming that the court was correct and that all of the conflicting precedents reviewed in the petition are wrong.

The rationale of the federal circuit and state supreme court cases holding that the FDIC assigns its special federal rights when it assigns the underlying assets conflicts sharply with the Insurance Commissioner's assertion that "only the rights of private parties are at issue here." Comm'r Opp. at 16. As the conflicting cases have recognized, any decision on whether the FDIC's special rights are transferred to FDIC assignees has a direct impact on

the value of those rights *to the FDIC*, and a direct impact on the ability of the FDIC to engage in purchase and assumption transactions in discharging its statutory responsibilities. *See* Pet. at 10-12, 14-15, 20-22. The rights of the FDIC and the interests of the national banking system are therefore very much at issue here, and the conflict among the lower courts on the question presented poses an ongoing dilemma for the FDIC. This Court should grant the writ to resolve that conflict.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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